



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 40/2015

In the matter between:

SYDNEY DLAMINI

Appellant

VS

SABELO SIMELANE

Respondent

Neutral citation:

Sydney Dlamini Vs Sabelo Simelane (40/2015) [2016]

SZSC 45 (30 June 2016)

Coram: MAGAGULA AJA, CLOETE AJA AND NXUMALO
AJA

For Appellant: Mr. O. Nzima

For 1st Respondent: Mr. M. Mtshali

Heard: 10 May, 2016

Delivered: 30 June, 2016

Summary: Abandonment of appeal at hearing – Attorney and client costs – Circumstances under which attorney and client costs may be awarded.

JUDGMENT

J. MAGAGULA AJA

[1] During the roll call of all matters to be heard in the May/June 2016 session of the Supreme Court, this matter was allocated the 10th May 2016 as its date of hearing.

[2] However when the matter was called or date of hearing Mr. Nzima who represented the Appellant informed the court that the Appellant was abandoning the appeal.

[3] Mr. Mtshali who represented the Respondent then applied that the court should award costs against the Appellant on the Attorney and client scale.

[4] **Herbstein and Van Winsen in the Civil Practice of the Superior Courts in South Africa 3rd edition** page 487 state:

“An award of the attorney and client costs will not be lightly granted, as the court looks upon such orders with disfavour and is loath to penalize a person who has exercised his right to obtain a judicial decision in any complaint he may have.”

[5] The learned authors proceed on the same page 487 to outline the grounds upon which the court may order a party to pay his opponent’s attorney and client costs the following:

“.....That he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious or frivolous, or that he has misconducted himself gravely either in the transaction under inquiry or in the conduct of the case.”

In this passage the learned authors are actually echoing the words of **Corbert AJ, in the case of Van Dyk Vs Conradie and Another, 1963 (2) SA 413** at 418.

[6] **In the case of Moshal Gevisser (Trade Market) Ltd Vs Midlands Paraffin Company 1977 (1) SA 64 Hefer, J** granted costs on the attorney and client scale because “All the defences raised by the defendant in opposing the application for judgment were so patently unfounded that they can only be stamped as frivolous and vexatious.”

[7] In the case of **Suzman Ltd Vs Pather and Sons 1957 (4) SA 690, Holmes J** stated:

“In these circumstances it seems to me that the defence was dilatory and not bona fide and I think this is a proper case for the award of costs on the attorney and client scale.”

[8] The above authorities are only a few of the plethora of authorities on the subject including local judgments. I shall turn to consider the circumstances of the present case.

[9] The Respondent herein instituted action proceedings at the High Court for payment of the sum of E65 000.00 (Sixty Five Thousand Emalangeni) together

with costs. The claim was based on an acknowledgement of debt which was signed by the Appellant.

[10] The Appellant filed a Notice of Intention to defend the matter. The Respondent filed a Declaration. The Appellant did not file any plea. The Respondent file a Notice of bar giving the Appellant file his plea. The Appellant did not file any plea. The Respondent then applied for Judgment by Default and the High Court duly granted it.

[11] When the Respondent tried to execute a writ pursuant to the Default judgment the Appellant filed an application for rescission of judgment. The court stayed execution of judgment pending finalization of the rescission application. This order was granted on the 24th October, 2014.

[12] On the 15th July, 2015 the application for rescission was withdrawn by the Appellant who tendered wasted costs. On the 6th August, 2015 the Appellant noted the present appeal.

[13] The appeal has serious defects and this in my view, even if not abandoned it was not going to see the light of day anyway.

[14] Firstly there is no legal basis for the appeal the application for rescission was not dismissed but was withdrawn by the Appellant.

[15] The judgment of the court *a quo* has not been attached to the record before court.

[16] Thirdly even if the rescission application had been dismissed, by the order dismissing such application would not be appealable without leave of this court since it is an interlocutory order. Interlocutory orders are only appealable with leave of this court in terms of Section 14 (1) (b) of the Court of Appeal Act 1954. The first ground of appeal would therefore be incompetent anyway.

[17] The record of appeal was filed way out of time and there is no application for condonation for filing the record out of time.

[18] The Appellant has not filed any heads of argument as enjoined by Rule 31 of the Court of Appeal Rules 1974.

[19] Taking into account the whole conduct of the Appellant in conducting the case in the court *a quo* and in this court, I cannot but come to only one conclusion. The defence purportedly put up by the Appellant against the Respondents claim is absolutely frivolous and calculated on to delay the finalization of the matter. In my opinion this is a classical example of a case in which this court to mark its disapproval of the Appellant by granting costs on the attorney and client scale.

20. In the premises the court makes the following order:

1. The appeal is abandoned and accordingly dismissed as such;
2. The Appellant is ordered to pay costs on the attorney and client scale.

J.S. MAGAGULA

ACTING JUSTICE OF APPEAL

I agree

K.M. NXUMALO

ACTING JUSTICE OF APPEAL

I agree

R.J. CLOETE

ACTING JUSTICE OF APPEAL